

CATCHWORDS

Immigration - Application for a December 1989 (temporary) entry permit on the compassionate ground that the refusal to grant the entry permit would cause extreme hardship or irreparable prejudice to the appellant and the Tongan parishioners attending his church - Whether the Tongan parishioners attending the appellant's church who were not named as nominators in the application and who had not nominated the applicant at the date the application was lodged can be relevant related persons under Regulation 131A(1)(g) - Whether relevant related persons must have nominated the applicant for the permit at the date of the lodging of the application - whether relevant related persons must be the Australian citizens or Australian permanent residents named in the application as the persons to whom extreme hardship or irreparable prejudice would be caused if the application for the entry permit sought is refused - Whether the prescribed criteria for the entry permit must be satisfied at the date of the lodging of the application - Requirements in relation to relevant related persons considered.

Migration Act 1958 (Cth) s.33(2)(b)

Migration Regulations 1989, Regulations 3AA, 42(1), 131A

Migration (Review) Regulations 1989 Regulation 21C

Yong v Minister for Immigration and Ethnic Affairs (1994) 54 FCR 176

Ching Leone Lim v Minister for Immigration and Ethnic Affairs, unreported, Full Court of the Federal Court (Beaumont, Einfeld and R D Nicholson JJ) 14 February 1996

Yim v Immigration Review Tribunal (1994) 54 FCR 186

Hamilton v Minister for Immigration and Ethnic Affairs (1994) 53 FCR 349

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 136 ALR 481

JOHN JOSEPH MCCARTHY V. THE MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS AND IMMIGRATION REVIEW TRIBUNAL

VG 172 of 1996

SPENDER, R.D. NICHOLSON and MERKEL JJ
5 DECEMBER 1996
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN DISTRICT REGISTRY
GENERAL DIVISION

No VG 172 of 1996

ON APPEAL FROM A JUDGE OF THE
FEDERAL COURT OF AUSTRALIA

BETWEEN:

JOHN JOSEPH McCARTHY

Appellant

-and-

THE MINISTER FOR IMMIGRATION AND
ETHNIC AFFAIRS

First Respondent

-and-

IMMIGRATION REVIEW TRIBUNAL

Second Respondent

COURT: SPENDER, R.D. NICHOLSON and MERKEL JJ
PLACE: MELBOURNE
DATE: 5 DECEMBER 1996

MINUTES OF ORDERS

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the first and second respondents of the appeal.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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COURT: SPENDER, R.D. NICHOLSON and MERKEL JJ
PLACE: MELBOURNE
DATE: 5 DECEMBER 1996

REASONS FOR JUDGMENT

THE COURT

Introduction

In March 1992 Mr Taniela Veamatahau ("the applicant") applied for the grant of a December 1989 (temporary) entry permit the prescribed criteria for which were those in Regulation 131A of the *Migration Regulations* 1989 ("the Regulations"). Regulation 131A provided:

131A (1) The following criteria are prescribed in relation to a December 1989 (temporary) entry permit:

- (a) the applicant for the entry permit was a prohibited non-citizen on or before 18 December 1989;
 - (b) the applicant was in Australia on, and has not left Australia since, 18 December 1989;
 - (c) the applicant applies, in accordance with these Regulations, before 19 December 1993 for the entry permit;
 - (d) on 15 October 1990 and continuously until the Minister decides to grant, or not to grant, the entry permit:
 - (i) the applicant has a genuine and continuing relationship as the spouse of an Australian citizen or of an Australian permanent resident; or
 - (ii) the applicant is a dependent child of an Australian citizen or of an Australian permanent resident; or
 - (iii) the applicant is an aged parent of an Australian citizen or of an Australian permanent resident and satisfies the balance of family test;
 - or
 - (iv) the applicant is:
 - (A) an aged dependent relative; or
 - (B) an orphan relative; or
 - (C) a special need relative; or
 - (D) a remaining relative within the meaning of regulation 9:
 - of a settled Australian citizen or settled Australian permanent resident; or
 - (v) there is any other compassionate ground for the grant of an entry permit, to the effect that refusal to grant the entry permit would cause extreme hardship or irreparable prejudice to an Australian citizen or Australian permanent resident;
 - (e) if, in the opinion of the Minister, the applicant should not be granted an entry permit without an assurance of support, an assurance of support, an assurance of support satisfactory to the Minister has been given;
 - (f) [repealed]
 - (g) the applicant has been nominated by the relevant person referred to in paragraph (d);
 - (h) the applicant notifies the Department, without unreasonable delay, of each change of his or her residential address.
- (2) In this regulation, "compassionate ground" does not include a circumstance that results directly from an event of a political nature only that has occurred in the applicant's country of citizenship or of usual residence.

In his application for the entry permit the applicant claimed that the refusal to grant it would cause extreme hardship or irreparable prejudice to his church, the Tongan parishioners attending his church and Father John McCarthy ("the appellant"). The application was refused.

The appellant applied to the Immigration Review Tribunal ("the IRT") for a review of the decision refusing the entry permit.

The IRT was satisfied that the prescribed criteria had not been met and affirmed the decision to refuse to grant the entry permit. The appellant applied to the Federal Court for a review of the decision of the IRT on the ground that it erred in law. Olney J dismissed the application. The appellant has appealed to the Full Court.

The main issue argued on the appeal related to whether the IRT erred in law in confining its inquiry to hardship or prejudice that would be caused to the appellant rather than to the appellant and his Tongan parishioners.

The application

The facts as found or accepted by the primary judge are as follows. By a letter dated 6 March 1992 Mr John Young, acting as the appellant's migration agent, made application on behalf of the applicant and his family for an entry permit under regulation 131A in reliance upon sub-paragraphs (1)(d)(v) and (g). Mr Young stated in the letter:

Please find enclosed a completed application for our client and his family to make application to your office to remain permanently in Australia.

Our client is claiming compassionate circumstances, which will either cause irreparable prejudice or extreme hardship to Father John Joseph McCarthy and his Parish Church in Preston. As you will see by the application, this has been so for a number of years and has continued up to the present day.

Enclosed with the letter was a Form 903 "Application to Remain Permanently in Australia". The form stated that the category

of entry permit sought was -

"Compassionate grounds under which hardship would be caused to an Australian citizen or permanent resident ..."

The form required that the relevant basis for the application be ticked in the appropriate box. The box ticked was:

compassionate circumstances of such magnitude that rejection of your application would cause extreme hardship or irreparable prejudice to the interests of an Australian citizen(s) or permanent resident(s).

The form stated that the Explanatory Notes which accompany the application form should be read carefully before the application was completed.

The Explanatory Notes stated that Section 1 of the form should be completed by the "Nominator" who was the Australian citizen or permanent resident affected by the applicant's departure from Australia. The Explanatory Notes in relation to Section J stated that the "nominator should be the other party to the relationship on which the application is based". Finally, the Explanatory Notes in relation to "Review Rights" stated that the Australian citizen or permanent resident who nominated the applicant can seek to review a decision refusing the entry permit.

Section H of the form contained the following printed statement:

SECTION H - Compassionate Grounds to be completed by the APPLICANT

The Migration Regulations provide for applications to be considered on compassionate grounds. The applicant is required to show that there are compassionate grounds of such magnitude that rejection of the application would create:

- . extreme hardship; or
- . irreparable prejudice

to the interests of the Australian citizen(s) or permanent resident(s) involved with the applicant.

In the space below provide details of your relationship with the Australian citizen(s) or permanent resident(s) who would be affected if you were obliged to leave Australia, and how rejection of your

application would cause the sort of impact described above upon that/those Australian person(s).

If there is insufficient space below, please attach a separate sheet.

In the space provided the applicant wrote:

Because our work done with the church is so vital we believe prejudice or hardship will be caused. Note Father John McCarthy's statement attached. The church will suffer, the parish will suffer, the Tongan's in the church will suffer, namely irreparable prejudice to the church and especially Father John McCarthy.

Section I provided for a person described as the "NOMINATOR (Australian person)" to complete the section. The typed portion of the section contained the following printed statement:

SECTION I - Compassionate Grounds, to be completed by NOMINATOR (Australian person)

The Migration Regulations provide for applications to be considered on compassionate grounds. The applicant is required to show that there are compassionate grounds of such magnitude that rejection of the application would create:

- . extreme hardship; or
- . irreparable prejudice

to the interests of the Australian citizen(s) or permanent resident(s) involved with the applicant.

After completing his name and address the Nominator, Father John Joseph McCarthy, provided written details of his

relationship with the applicant and how [he] would be affected (in the terms above) if that person was obliged to leave Australia.

The details were:

Taniela and his family are vital members of our church as my detailed statement attached shows. This has been so since 1988 up to the present.

The appellant, in accordance with the requirements set out in Section J entitled "Nomination", stated that he wished to nominate the applicant for permanent residence because he is "a person with compassionate ties to me" and completed the Section by providing the personal information and statutory declaration required of him as the "Nominator".

The following statement of the appellant accompanied the Application:

I Father John Joseph McCarthy, of 322 Bell Street, Preston in the State of Victoria hereby make the following declaration in support of Taniela Veamatahau, Anistasio Amato, and Maake Veamatahau.

I ask that the Department of Immigration Local Government and Ethnic Affairs look very carefully at the following detail, which I believe will show that hardship or prejudice will be created if Taniela and his family are forced to return to Tonga.

As Father of the Sacred Heart Parish in Preston, I along with the Tongan community (who support our parish) strongly believe that the church is going to suffer without Taniela's influence and support, within the church.

Taniela has a positive influence in the community, he has an ability to teach and help other Tongans, especially when it comes to the defining of scriptures.

Taniela is heavily involved in the Tongan choir and is heavily involved in the religious services on week day's and at the weekends.

Anistasio and Maake (included in the application) also play a vital role within the church.

The family's support and help within the Tongan community is vital to both the church and other Tongan parishioners of our church in Preston.

I strongly believe as nominator of this application that there will be a degree of prejudice and hardship to the church which along with the work that his family does, will be in my eyes irreparable in the future.

I believe the Tongan community is currently drawing up a petition which will be forwarded to your office in the coming months and based on the work and support that this family gives to our church, I strongly suggest that your department looks closely at these compassionate circumstances.

This family through the parish in a general sense and through the choir,

help many other Tongans with their everyday problems.

As head of the Sacred Heart Parish, in Bell Street, Preston, I strongly support this application because of the overall work put in

by this family within our parish, which, if this application is rejected will create hardship and/or prejudice to the interests of myself and my Parish.

SIGNED:.....
FATHER JOHN JOSEPH MCCARTHY 3.3.92

In the application, which included the documents accompanying it, the applicant claimed that the refusal of the entry permit would cause extreme hardship or irreparable prejudice to the church, the Tongan parishioners attending his church and the appellant. However, the only person identified in the application as the nominator of the applicant was the appellant. In the material before the IRT and the Court no other person was, or could be, identified as having nominated or as having been a nominator of the applicant at the date of the application.

By a letter dated 28 August 1992 Mr Young lodged "more evidence" with the Department to support the application. Enclosed with the letter was a Petition signed, with supporting comments, by a number of members of the Tongan community. The printed portion of the Petition stated:

We the undersigned strongly support the application put up by Taniela Veamatahau and the Nominator, Father John Joseph McCarthy.

The support given by Taniela to the Tongan Community in Victoria is invaluable and any decision by The Department of Immigration Local Government and Ethnic Affairs to send Taniela and his family back to Tonga is going to prejudice, not only Father John McCarthy, but the entire Tongan Community.

By a letter dated 25 May 1993 the applicant was advised that his application was refused. In the letter the applicant was advised of the right to apply for a review of the decision in the following terms:

As you made this entry permit application under concessions for persons illegally in Australia, you do not have a right to review with the Migration Internal Review Office. However, Migration (Review) Regulations provide for your nominator, as an Australian citizen or permanent resident, to apply to the Immigration Review Tribunal (IRT) for a review of the decision. If you would like to know whether your nominator has a right of review of the decision conveyed in this letter, he should contact the IRT on 6721800.

The advice accorded with Regulation 21C of the **Migration (Review) Regulations** 1989 ("the Review Regulations") which provided that only the Australian citizen or permanent resident who nominated an applicant for a December 1989 (temporary) entry permit may apply for review of a decision to refuse the permit.

IRT Review

The appellant, as the nominator of the applicant, applied for review of the decision and lodged submissions with the IRT. The application for review was stated to be based upon extreme hardship or irreparable prejudice to

"Father John Joseph McCarthy of the Preston Sacred Heart Parish or its parishioners within the Tongan community".

The submissions stated that the prejudice caused to the appellant flowed from a

"general loss which would be experienced in the parish and especially its Tongan members".

By a letter dated 17 March 1994 Mr Young informed the IRT of the witnesses proposed to be called at the hearing. The letter stated that two families, in particular, will be "severely affected" if the applicant and his wife are forced to leave Australia. The families referred to were the "Tamura Family" and the "Vivili Family". Members of each family had been signatories to the petition lodged on or about 28 August 1992 and in the petition one of the members of the Vivili family noted that as the applicant was a

very devoted person to the community especially with the spiritual aspects if he ever goes back we'll suffer as no-one can take his place.

The IRT declined to permit evidence from the two families which was directed at establishing extreme hardship or irreparable prejudice to the families rather than to the appellant. The Tribunal stated that under the Regulations it was required to have regard only to the appellant as the person in respect of whom evidence of these matters could be adduced.

In its decision dated 31 March 1994 the IRT affirmed the decision under review. The concluding paragraph of the IRT's reasons for decision stated:

After detailed consideration of the evidence in this matter, I am disposed to make the same finding. I repeat that I have been impressed by the evidence given by Father McCarthy in particular. His devotion to his church and the needs of his parish cannot be questioned. The importance of the role undertaken by Mr Veamatahau is significant, and need not be underestimated. I am cognisant of the fact that were he to leave, communication difficulties would no doubt be experienced between

Father McCarthy and the Tongan parishioners. For a time, common problems may re-occur. However, I am not able to accept that any hardship and/or prejudice to be suffered would be of the "*utmost nature and beyond repair*". Certainly the Tongan parishioners seem to have a relatively successful model of both voluntary and committee activity in place. Although I accept that it may not work as efficiently or successfully given the principal's absence, I am unable to accept the fact that it would immediately break down irretrievably. Therefore, while I accept the fact that the quality of the voluntary work undertaken, and its importance to the affairs of the parish in general may be

diminished, I am not able to find that Mr Vaematahau's departure would mean a total break-down or "fracture" in the affairs of this church, particularly as they relate to members of the Tongan community and particularly as they relate to the personal interests of Father McCarthy. I reluctantly find therefore that the standard intended by the Parliament in the drafting of the words of this sub-provision has not been met in this instance. Therefore this application must be refused.

Appeal

The appellant appealed to the Court pursuant to s 138 of the ***Migration Act*** 1958 (Cth) as in force at the time ("the Act") on the ground of error of law. The primary ground argued was that the IRT erred in law in treating the appellant as the sole relevant related person for the purposes of Regulation 131A(1)(d) (v) and (g). In dismissing the appeal the learned trial Judge concluded:

In the circumstances of the case the Tribunal correctly treated Fr McCarthy as the sole nominator of the principal and as the sole relevant related person for the purposes of r 131A(1)(g). The other aspects of the appeal have been based upon misconceptions of the reasoning and decision of the Tribunal. It has not been demonstrated that the Tribunal's decision is erroneous in law. The application will be dismissed with costs.

The main ground argued on the appellant's appeal to the Full Court was whether the IRT and Olney J had erred in law in treating the appellant as the sole relevant related person for the purposes of Regulation 131A(1)(d)(v) and (g). In the event that the IRT and Olney J were in error in reaching that conclusion the error would be one of law and the matter would have to be remitted back to the IRT.

The Appellant's Submissions

In summary, the appellant's counsel submitted that:

- (a) the application together with all of the supporting material, claimed that the Australian citizens or permanent residents who would suffer extreme hardship or irreparable prejudice if the applicant was refused the entry permit were, or at the least included, Father McCarthy and the Tongan parishioners attending his church;
- (b) a fair reading of the application and the material lodged in support of it makes it quite clear that Father McCarthy is acting as nominator on his own behalf and also for his parishioners;
- (c) accordingly, the IRT was obliged to receive evidence from parishioners which related to the hardship and prejudice they would suffer if the entry permit was refused;
- (d) in failing to receive that evidence and in determining the application by reference only to the hardship and prejudice which would be caused to the appellant, the IRT did not discharge its duty to determine the application for review in accordance with law;
- (e) Olney J, in dismissing the appeal, misconstrued the relevant documents and regulation 131A(1) (d) (v) and (g);
- (f) the matter should be remitted to the IRT to be determined in accordance with law.

The Legislative Scheme

Section 33(2) (b) of the Act provided for regulations to be

made entitling a person to an entry permit of a particular class -

"if that person satisfies all the prescribed criteria in relation to that class".

Section 34 provided that the Minister is not required to consider and shall not in any circumstances grant an entry permit unless the application for an entry permit of a particular class is in accordance with the Regulations.

Regulations 34A and 42(1) of the Regulations, in so far as is relevant, provided:

34A. ... an application for a visa or an entry permit must satisfy the prescribed criteria in relation to the relevant class of visas or the entry permit other than public interest criteria and prescribed health criteria at the time of application and as applicable at that time.

42. (1) ... a person is entitled to be granted an entry permit referred to in these Regulations if the person satisfies the prescribed criteria in relation to that entry permit.

These provisions operate to require the prescribed criteria to be satisfied at the time of the application for the permit. Accordingly, for an entry permit in reliance upon regulation 131A(1)(d)(v) and (g) to be granted, at the date of the application -

- the applicant must have "been nominated by the relevant related person referred to in paragraph (d)" and
- the relevant related person referred to in paragraph

(d) (v) must be the Australian citizen or Australian permanent resident to whom extreme hardship or irreparable prejudice would be caused if the application for the entry permit sought is refused.

In ***Yong v Minister for Immigration and Ethnic Affairs*** (1994) 54 FCR 176 at 180, Moore J considered regulations 34A and 131A and concluded that the relevant related person under sub-paragraph (g) must be the person referred to in sub-paragraph (d) in an application based on that sub-paragraph. His Honour also concluded at 181 that by reason of regulation 34A(1) the applicant must be nominated by the relevant related person at the time the application is made. We are in agreement with both conclusions: see also ***Ching Leone Lim v Minister for Immigration and Ethnic Affairs***, unreported, Full Court of the Federal Court (Beaumont, Einfeld and R D Nicholson JJ) 14 February 1996 at 18.

The Nominator

The applicant was nominated by the appellant at the date of the application. At that date and indeed at any relevant later date, it has not been established that any other person nominated the applicant. No submission to the contrary was made on behalf of the appellant before the IRT.

It can be accepted, as was submitted by the appellant, that the application was not limited to a claim of hardship and

prejudice to the appellant. However, the issue arising in the present case is not determined by the identification of the persons who are alleged or claim to fall within regulation 131A(1)(d)(v). The issue is to be determined by identifying the relevant related person who has *in fact* nominated, and is identified in the evidence before the IRT as having nominated, the applicant at the date of the application. Only Father McCarthy satisfied the criteria in that regard.

The evidence did not afford a basis for any other conclusion. The defect in that regard is not one of mere procedure or want of form in the application itself. The legislative scheme, in a substantive rather than a procedural sense, required that the nomination be *by* the relevant related person at the date of the application so that the grounds in sub-paragraph (d) including the compassionate ground could be applied in relation to the nominated individuals.

We have not overlooked the authorities relied upon by the appellant in order to suggest that a more expansive or liberal view should be taken of the regulation. ***Yim v Immigration Review Tribunal*** (1994) 54 FCR 186 and ***Hamilton v Minister for Immigration and Ethnic Affairs*** (1994) 53 FCR 349 were relied upon in that regard. We are unable to accept that submission. This is not a case where it can be said of any individual parishioner that he or she "did all that, in the circumstances, she could reasonably have been expected to

do..." (*Cf Hamilton* at 358). This was also not a case where the applicant was in custody or where there has been misinformation or supply of incorrect and incomplete forms or inadequate information. Further, in our view these authorities do not afford a basis for giving regulation 131A(1)(d)(v) and (g) an operation which differs from that set out by us above.

In his reasons the primary judge concluded regulation 131A(1) (d) (v) was incapable of application to other than individual persons. Consequently, he did not consider it applicable to a body corporate or institution such as "the church". He also accepted regulation 131A(1) (d) (v) was capable of being construed as applying to a case in which more than a single person was affected in the required manner and he accepted sub-paragraph (g) was capable of being construed as having application to a case where there were multiple nominators. He further accepted a nomination may nominate an applicant on behalf of him or herself and another or other Australian citizen(s) or resident(s). He said "the whole concept of requiring that there be a nominator in this context is to identify the Australian citizen(s) or permanent resident(s) to whom the relevant hardship and/or prejudice may be caused". He concluded Father McCarthy identified only one such person, namely himself.

The primary judge also considered the position in relation to accompanying correspondence and particularly the petition. He concluded that the petition did not assert that the signatories wished to act as nominators. The appellant did not purport to be acting as agent for and on behalf of other nominators. He concluded the material before the Tribunal was capable of one interpretation, namely that the appellant was the only person who had nominated the applicant and in those

circumstances the regulation required the Tribunal to have regard only to the personal circumstances of the appellant. These conclusions were open to the trial judge and to the Tribunal on the evidence. No error of law is shown in relation to them.

Accordingly, Olney J did not err in concluding the Tribunal had not erred in concluding the appellant was the sole relevant related person for the purposes of regulation 131A(1)(d)(v) and (g).

Other Grounds

The appellant also submitted that the IRT erred in law in construing the Regulations and imposing criteria or standards of proof under regulation 131A(1)(d)(v) which were not in accordance with law. Essentially, the submission criticised his Honour's conclusions in relation to the concluding paragraph of the IRT's decision which we have set out above. His Honour concluded that the IRT did not misconstrue the Regulations or the prescribed criteria and did not apply an incorrect standard of proof. Olney J was satisfied that the IRT discharged its duty to assess whether the largely uncontroverted evidence met the prescribed criteria in relation to hardship and prejudice. His Honour concluded that the IRT -

was unable to make the critical findings sought by the applicant because the evidence was not sufficiently persuasive. The Tribunal did not

commit an error of law by being unconvinced by the evidence. It was essentially a question of fact as to whether any hardship that was proved was extreme or any prejudice was irreparable. The case called for an exercise of judgment on the Tribunal's part and it clearly approached that task in a principled and reasonable manner.

In our view the learned trial Judge's conclusions were correct. We cannot usefully add to his Honour's reasoning and conclusions on these issues other than to repeat that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed: see ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** (1996) 136 ALR 481 at 490 per Brennan CJ, Toohey, McHugh and Gummow JJ. In our view the appellant's submissions on these additional grounds offended that principle. In any event, to the extent that there may have been some imprecision or looseness in the language used by the IRT, it seems to us that the language was merely responsive to the case put and findings sought by the applicant and the appellant.

Conclusion

The grounds argued on behalf of the appellant have not been made out. Accordingly, the appeal should be dismissed with costs.

There can be little satisfaction at the outcome of the present case. The legal defects in the original nomination resulted

in the applicant and the appellant not being heard on the case they wished to put, being that of hardship and prejudice to Father McCarthy and his parishioners. The outcome of the present case offers a warning to migration agents and legal practitioners as to the importance of ensuring that the prescribed criteria for an entry permit are fully understood and carefully considered at the time the application for the permit is made. It also demonstrates the need for advice to intending applicants and nominators of the need for a nomination to be made by or on behalf of each and every person to be treated as a nominator for the purposes of the application of the compassionate ground.

I certify that this and the preceding
17 pages are a true copy of the
reasons for judgment of the
Honourable Justices Spender, R.D.
Nicholson and Merkel

Associate:

Date:

Heard: 4 October 1996

Place: Melbourne

Judgment: 5 December 1996

Appearances: Mr. I. Freckelton instructed by Armstrong Ross
appeared for the appellant.

Ms. M. Kennedy instructed by The Australian
Government Solicitor appeared for the
respondents.